ACE KING PTE. LTD.

v.

CIRCUS AMERICANO LTD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. C2127 OF 1983]
17 OCTOBER 1983

CIVIL PROCEDURE: *Mareva injunction - Application to dissolve - Jurisdiction - Order to restrain payments from income - Application to dismiss writ and statement of claim - Security in lieu of undertaking - Costs - Application to intervene - Application for order to be set aside or varied.*

CONTRACT: *Whether a binding agreement had been concluded - Whether 2nd defendant a party - Jurisdiction.*

Two applications were made arising from a Mareva injunction ordered on 11 August 1983, against the defendants and third parties and from an order dated 26 August 1983 that Nutritional Products Sdn. Bhd. ("Nupro") and/or Majlis Sukan Negara, Malaysia, be restrained from paying any monies earned from the Gerry Cottle Circus in Malaysia in so far as the same did not exceed the sum of RM876,337.92 except in the circumstances specified in the order. Prior to the application for the mareva injunction, the plaintiffs, a private limited company incorporated in Singapore had filed a writ against the defendants in the High Court in Kuala Lumpur claiming damages in the sum of RM876,337.92 for breach of contract. The first application was by the 2nd defendant and the second application by the "Circus Entertainment Management Ltd." (the interveners).

The applications were argued before the Judge in chambers. Further arguments were heard in open Court under O. 56, r. 2(2) of the Rules of the High Court 1980.

Held:

A. Regarding the application of the 2nd defendant's prayer for dismissal of the plaintiffs' writ and statement of claim

[1] A binding agreement had been concluded between the plaintiffs and the defendants, including the 2nd defendant. (*Lim Keng Siong & Anor. v. Yew Ah Tee* [1983] CLJ (Rep) 231).

[2] Order 11 of the rules of the High Court did not apply in the case of the 2nd defendant.

[Application in respect of prayer dismissed.]

Prayer for dissolution of the Mareva injunction.

The Court had jurisdiction to grant the Mareva injunction. The High Court has jurisdiction to grant a Mareva Injunction in appropriate circumstances. The plaintiff must show that he has a good arguable case. Secondly, he must produce evidence that the defendant has assets within jurisdiction and that there is a risk of the assets being removed before the judgment is satisfied. In the case before the Court, both the requirements were satisfied (*Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd.* [1982] 1 MLJ 260; *The Tataingele* [1980] 2 Lloyd's Law Report 193 @ 197 & 198; *Third Chandris Shipping Corporation v. Unimarine S.A.* [1979] 1 QB 645, 668, 669).

[Application in respect of prayer dismissed.]

Prayer for provision of suitable security for due performance of the order of the Court in lieu of the plaintiff's undertaking to the Court dated 11 August 1983.

The case was a suitable one to require the plaintiffs to provide the security asked for. The Mareva injunction was to continue to be in force on the condition that the order for security was complied with by the plaintiffs. (*Z Ltd. v. A-Z & AA-LL* [1982] 1 QB 558, 585; *Harman Pictures, N.V. v. Osborne & Ors.* [1967] 2 All ER 324).

[Order made for security in the sum of RM200,000.]

Prayer for security costs

It was appropriate that the plaintiffs provided security for costs as they were resident out of the jurisdiction of the Court. (*Aeronave S.P.A. & Anor. v. Westland Charters Ltd. & Ors.* [1971] 1 WLR 1445, 1449; O. 23, Rules of the High Court 1980).

[Order made for security for costs in the sum of RM10,000.]

B. Regarding the application of Circus Entertainment Management Ltd.

1. For leave to intervene

   [The applicants should be allowed to intervene.]

2. For order of 26 August 1983 to be set aside or varied.

   The debts owed by the interveners and Nupro were legitimate debts and should be allowed to be paid to the creditors. A Mareva injunction should not preclude the defendants from using their assets to pay their debts as they fell due. (*Iraqi Ministry of Defence & Ors. v. Arcepey Shipping Co. SA & Anor.* [1980] 2 WLR 488, 494).

   [Order of 26 August 1983 varied, subject to verification by the Senior Assistant Registrar.]

3. For release of RM116,000 for freight charges and RM50,000 for transportation regarding the circus animals

   In the light of the evidence submitted by the interveners it was clear that the animals did not belong to the 3rd defendant.

   [Order of 26 August 1983 further varied. Order for release of the animals made.]

Cases referred to:
Lim Keng Siong & Anor. v. Yew Ah Tee [1983] 2 MLJ 39; [1983] CLJ (Rep) 231
Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd. [1982] 1 MLJ 260
The Tataingele [1980] 2 Lloyd's Rep 193
Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak dan Gas Bumi Negara [1977] 3 WLR 518
Allen & Ors. v. Jambo Holdings Ltd [1980] 1 WLR 1252
Third Chandris Shipping Corporation v. Unimarine S.A. [1979] 1 QB 645
Z Ltd. v. A-Z & AA - LL [1982] 1 QB 558
Iraqi Ministry of Defence & Ors. v. Arcepey Shipping Co. S.A. & Anor. [1980] 2 WLR 488
Harman Pictures NV v. Osborne & Ors. [1967] 2 All ER 324
Aeronave S.P.A. & Anor. v. Westland Charters Ltd & Ors. [1971] 1 WLR 1445

Legislation referred to:
Rules of the High Court 1980, O. 11, O. 18 r. 19, O. 23, O. 56 r. 2(2)

Other sources referred to:
Chitty on Contracts, 24th Edn., Vol. 1, p. 102, para. 100

For the plaintiffs - K. Ananthan M/s. Skrine & Co.
For the 2nd defendant - Cecil Abraham M/s. Shearn Delamore & Co.
For the interveners - Prasad Abraham M/s. Abraham & Partners

JUDGMENT

Zakaria Yatim J:

There were two applications made before me in Chambers arising from a Mareva injunction ordered against the defendants and third parties. The first application (encl. 10) was filed by the second defendant and it was argued before me in Chambers on 27 August, 1 & 2 September 1983. Subsequently, further arguments were heard in Open Court on 16 and 24 September 1983 under O. 56 r. 2(2) of the Rules of the High Court, 1980. The second application was filed by strangers to the proceedings, who called themselves, "Circus Entertainment Management Ltd." (hereinafter referred to as the "Interveners"). This application (encl. 16) was argued before me in Chambers on 9, 12 and 14 September 1983. Further arguments were heard in Open Court at the same time as the hearing of the first application.

On 11 August 1983, on an *ex-parte* application by the plaintiffs, Dzaiddin J ordered a Mareva injunction (encl. 28) restraining the defendants, from removing from the jurisdiction of the Court, Pleding, giving them by way of security or otherwise disposing or in any way dealing with any of the asset or assets in which they or any of them are beneficially interested insofar as the same do not exceed the sum of RM876,337.92.

Prior to the *ex-parte* application made on 11 August 1983, the plaintiffs, a private limited company incorporated in Singapore, had filed a writ (encl. 1) against the defendants in the High Court in Kuala Lumpur (Commercial Division) claiming damages in the sum of RM876,337.92 for breach of contract.

On 26 August 1983, at the instance of the plaintiffs, Dzaiddin J made a further order (encl. 27) that Nutritional Products Sdn. Bhd. (hereinafter referred to as "Nupro") and/or Majlis Sukan Negara, Malaysia be restrained from paying any monies from the income earned from the staging of the Circus known as the Gerry cottle Circus in Malaysia insofar as the same do not exceed the sum of RM876,337.92 to any person save the Government of Malaysia for entertainment taxes and to themselves for any monies that may be due to them or either of them by way of commission or as their share of the income form the staging of the circus in Malaysia.

In the first application the second defendant sought for the following orders:

(1) That the plaintiffs' writ of summons and statement of claim be dismissed on the ground that it disclosed no reasonable cause of action against the second defendant;

(2) That the order made on 11 August 1983 be dissolved;

(3) That the plaintiffs do provide suitable security for the due performance of the order of the Court in lieu of their undertaking to the Court dated 11 August 1983; and

(4) That the plaintiffs do provide security for costs in the sum of RM25,000.

In the second application the Interveners asked for an order that:

(a) the applicants be given leave to intervene in the proceedings; and

(b) that the order made on 26 August 1983 against the second defendant be set aside or varied.

I shall deal with the prayers in the two applications in order of their sequence as set out above.

In prayer (1) of the first application, the second defendant was asking that the plaintiffs' writ and statement of claim be dismissed on the ground that it disclosed no reasonable cause of action against the second defendant. This application was made pursuant to the provisions of O. 18 r. 19 of the Rules of High Court, 1980.

The plaintiffs' claim is based on an agreement concluded between the plaintiffs and the defendants on or about 21 April 1982. Under this agreement the defendants appointed the plaintiffs as their sole exclusive promoter to manage the presentation, co-ordination and management of the Gerry Cottle Circus in Singapore and Malaysia. The plaintiffs' appointment was subject to the terms and conditions contained in the agreement. According to the plaintiffs, the defendants, in breach of the said agreement, had staged the Circus at Subang Jaya Malaysia with Nupro and Majlis Sukan Negara, Malaysia as the promoters cum organizers and sponsors.

The second defendant denied that any such contract was concluded between the plaintiffs and the defendants.

In order to determine whether a contract was concluded between the parties, I have to examine the relevant evidence. Two documents were tendered as exhibits. One is an agreement which was prepared by an advocate and solicitor of the Supreme Court, Singapore, on the instruction of the plaintiffs and the second defendant. The document was, however, not signed. The text of this agreement was subsequently sent by telex from the plaintiffs to the Second defendant. Before the agreement was prepared, there were a series of negotiations between the plaintiffs and the second defendants. As a result of the negotiations, both parties agreed on the terms and conditions of the agreement to be concluded. There is ample evidence that both parties had agreed on the terms and conditions of the agreement. In para. (9) of his affidavit (encl. 3), the managing director of the plaintiffs, Edward Chan Poh Kok, stated as follows:

> I say that just prior to the Second defendant's departure on or about 20 April 1982, the Second defendant on his behalf and on behalf of the other defendants ... agreed to the appointment of the plaintiffs solicitor, one Miss Kay Siew Tuan ... for the purpose of engrossing the draft Agreement which had been agreed to by the plaintiffs and the defendants. As the Second defendant had to leave Singapore on the very evening ... it was not possible for the parties to execute the Agreement on that day ...

The affidavit of the advocate and solicitor (encl. 4) also stated that on 20 April 1982, both Edwin Chan Poh Lock and the second defendant instructed her to prepare an agreement. They informed her of the "several terms and conditions to be incorporated in the Agreement, which they said they had already agreed upon ..." There was nothing in the affidavit of the second defendant (encl. 9) to say that there was no agreement on the important terms of the contract. Indeed, he stated that the agreement prepared by Miss Kay Swee Tuan was intended to be entered into between the plaintiffs and the first defendant. He overlooked that the agreement included his name and the third defendant as parties to the contract.

The second defendant argued that the agreement in the telex is a draft agreement. It is true that the first paragraph of the telex refers to the agreement as a draft agreement. But the same paragraph also states that the draft agreement was made "following my discussion/ agreement with Mr. Gerry Cottle in Singapore today." The same paragraph invited the second defendant to contact Miss Kay for "further clarification" and not further amendents.

From the evidence shown above, I am satisfied that the parties had concluded their negotiations and an agreement had been reached on the terms and conditions of the contract. The only thing that was not done was the signing of the contract which had been prepared by the lawyer. I am, therefore, of the opinion that a contract had been concluded between the plaintiff and the defendants. *Chitty on Contracts*, 24th Edn. Vol. 1 clearly states at p. 102, para. 100 as follows:

> The question whether the parties have reached a complete agreement frequently arises where there had been an agreement in general terms but the parties have stipulated for the execution of some further formal document. The problem then is whether the agreement is too general to be valid in itself and is dependent on the making of a formal contract, or whether the parties have in fact completed their agreement so that the execution of a further formal contract, though desirable, is not essential. This is a question of construction for the Court. In the words of Parker J in *Von Hatfield-Wildenburg v. Alexander:*
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> > It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.

My finding above is further supported by the recent decision of the Federal Court in *Lim Keng Siong & Anor. v. Yew Ah Tee* [1983] CLJ (Rep) 231. In this case the appellants wrote a letter on 1 March 1976, which confirmed that they were willing to sell their land at a certain price subject to contract. After some negotiations, the respondent agent wrote to the appellants on 3 March 1976, stating that the appellants had accepted the respondent's offer regarding the sale of the land. The appellants subsequently refused to go on with the sale and to complete the agreement. The Federal Court held that on the evidence and the exhibits of the case, it was the intention of the parties to come to a definite and complete agreement with regard to the sale of land. The mere fact that a written agreement had to be drawn up and executed by them did not necessarily mean that there was no legally binding and enforceable agreement. A legally binding and enforceable agreement was indeed concluded on 3 March 1976.

Counsel for the second defendant argued that even if there was a contract, the contract must have been entered between the plaintiffs and the first defendant as the second defendant was, at the material time, a director of the first defendant. I am unable to accept this argument. The agreement prepared by the Singapore advocate and the solicitor and the draft agreement contained in the telex clearly cite the second defendant as a party to the contract, in addition to the first defendant.

The second defendant further contended that the contract was not made within jurisdiction. The breach also occurred outside jurisdiction. No writ could, therefore, be issued against the first and the third defendants within the meaning of O. 11 of the Rules of the High Court, 1980. In my opinion the facts of this case clearly fall within the meaning of O. 11. In the case of the second defendant, O. 11 does not apply at all. He was within jurisdiction when the writ was served on him. Further more he had submitted himself to the jurisdiction of this Court by filing the first application.

On the grounds stated above, I dismissed the application of the second defendant in respect of prayer 1.

With regard to prayer 2 in the first application, Counsel for the second defendant submitted that the Court had no jurisdiction to grant a Mareva injunction. With respect, I cannot accept this submission. The question of whether this Court has jurisdiction to grant a Mareva injunction has been dealt with by the Federal Court in *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn.* Bhd. [1982] MLJ 260. In delivering the judgment of the Court in that case, the learned Chief Justice (as he then was) said:

> We have accordingly come to the conclusion that ... the High Court has jurisdiction to grant a Mareva injunction in appropriate circumstances. *Ibid*, 263.

There are two requirements to be satisfied before a Mareva injunction is granted by the Court:- Firstly, the plaintiff must show that he has a good arguable case. *The Tataingele* [1980] 2 Lloyd's Rep 193 at p. 197 & 198; *Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak dan Gas Bumi Negara* [1977] 3 WLR 518 and *Allen & Ors. v. Jambo Holdings Ltd* [1980] 1 WLR 1252 at p. 1255. Secondly, the plaintiff must produce evidence that the defendant has assets within jurisdiction and that there is a risk of the assets being removed before the judgment is satisfied. *Third Chandris Shipping Corporation v. Unimarine S.A.* [1979] 1 QB 645 at p. 668 & 669; *Z Ltd. v. A-Z and AA - LL* [1982] 1 QB 558 at p. 585 and *Iraqi Ministry of Defence & Ors. v. Arcepey Shipping Co. S.A. & Anor.* [1980] 2 WLR 488 at p. 494.

In the instant case, the plaintiffs have satisfied both the above requirements. As already stated, the plaintiffs claimed that they had concluded a contract with the defendants whereby the former were appointed to be the agents of the defendants to stage a circus show in Singapore and Malaysia. The defendants, in breach of the Agreement, appointed a different agent and staged the circus in Malaysia only. In my opinion, the plaintiffs had established an arguable case especially when it is found that a valid contract had been concluded between the parties. With regard to the second requirement, the plaintiffs had clearly shown in one of their affidavits (encl. 3) the position regarding the assets of the defendants. The affidavit clearly stated:

> 14. To the best of my knowledge, the defendants' only assets within the jurisdiction of this Honourable Court are the money which they have received and will continue to receive from the staging of the Circus in Malaysia from 30 July to 31 August 1983, their caravans, goods, equipments and other things owned by the Circus.
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> 15. The defendants have no other assets in Malaysia that I know of other than those mentioned in the preceding paragraph. The defendants are all foreigners and once their aforesaid assets are moved out of Malaysia, which is likely to be at the end of this month, they will be lost to the plaintiffs who will not be able to levy execution on such judgment as this Honourable Court may deem fit to grant herein to the plaintiffs in due course.

In my opinion this is an appropriate case to grant a Mareva injunction and I accordingly dismissed the application in prayer 2.

In prayer 3, the second defendant sought the order of the Court that the plaintiffs do provide suitable security for the due performance of the order of the Court in lieu of their undertaking to the Court dated 11 August 1983. Counsel for the second defendant argued that the plaintiffs are resident in Singapore and outside the jurisdiction of the Court. He therefore, asked that the plaintiffs be ordered to provide security in the sum of RM200,000 in lieu of the usual undertaking given to the Court earlier.

Normally, the Court only requires the plaintiff to give an undertaking as to damages in case he falls in his claim or the injunction turns out to be unjustified. But the Court has the discretion, in suitable cases, to require a bond or other security to support the undertakings given to the Court. *Z Ltd v. AZ, Supra*, @ 577; and *Third Chandris Corporation v. Chaimarina S.A. Supra*, @ 669. In the instant case, the plaintiffs are resident in Singapore out of the jurisdiction of the Court. According to the affidavit of the second defendant (encl. 9), the plaintiffs assets are not known and it is believed that they have no assets within jurisdiction. In my opinion this is a suitable case to require the plaintiffs to provide the security asked for. Accordingly, on 2 September 1983, I made an order in Chambers requiring the plaintiffs to provide security in the sum of RM200,000 within a month. I think this is a fair bearing in mind all the known assets of the defendants within jurisdiction, including the circus animals, were the subject matter of the Mareva injunction.

Since making this order, my attention was drawn by Counsel for the second defendant to the case of *Harman Pictures NV v. Osborne & Ors.* [1967] 2 All ER 324. In this case Goff J said:

> I must however, impose terms for the protection of the defendants, and that is indeed conceded by Counsel for the plaintiffs. As the plaintiffs are not within the jurisdiction I must require them to give security towards implementing any liability they may incur under their cross-undertaking in damages. It is impossible to quantify that at this stage, but they have offered £10,000, which is the figure I had independently conceived in my own mind. The injunction will therefore be conditional on the plaintiffs giving security in that amount to the satisfaction of the master within twenty-one days or such further time, if any, as the parties may agree or the master direct. Further, the defendants will have liberty to apply to discharge the injunction at any time. Thus if, as the matter proceeds, it looks as if the defendants will be ready to distribute before the trial, they can come back and ask to have the injunction discharged, or for more security, by which time the Court will be better able to estimate the amount of the loss which the defendants will suffer if they be further restrained. The defendants will also be able to come back if there be any other material change in the circumstances.

In the light of this authority, I now hold that the Mareva injunction granted on 11 August 1983, shall continue to be in force on the condition that the order made by me on 2 September 1983, with regard to security, is complied with by the plaintiffs.

Apart from security in lieu of undertaking as to damages, the second defendant also asked the Court for an order that the plaintiffs do provide security for costs in the sum of RM25,000. Since the plaintiffs are resident out of the jurisdiction of the Court, I think it is appropriate that they provide security for costs. In *Aeronave S.P.A. & Anor. v. Westland Charters Ltd. & Ors.* [1971] 1 WLR 1445 @ 1449, Lord Denning MR said:

> It is the usual practice of the Courts to make a foreign plaintiff give security for costs. But it does so, as a matter of discretion, because it is just to do so. After all, if the defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order.

See also O. 23 of the Rules of the High Court 1980. On 2 September 1983, I made an order in Chambers requiring the plaintiffs to provide security for costs in the sum of RM10,000 within 30 days. The said order still stands.

I now turn to the application of the Interveners.

With regard to the application in prayer (a) asking the Court to grant the applicants leave to intervene in these proceedings, I made an order, with the consent of the parties concerned, allowing the application.

In the second prayer, the Interveners asked that the order dated 26 August against the second defendant be set aside or varied.

In their affidavit (encl. 14) in support of their application, the Interveners, a company incorporated in Hong Kong, claimed that the Gerry Cottle Circus was owned and managed by them and not the defendants. According to them, an agreement was concluded between their company and Nupro on 8 June 1983, whereby Nupro was to manage the staging of the circus at Subang Jaya.

Both the Interveners and Nupro claimed that they had to pay legitimate debts to a number of creditors. Nupro, in their affidavit (encl. 21) said that, in performing their contractual obligations under the agreement, they had to pay sums of money to a number of creditors as listed out in the Affidavit. The Interveners also said that they had to pay the weekly salaries of their artistes.

After examining the relevant affidavits and the exhibits attached thereto, I was satisfied that these debts were legitimate debts which had to be paid to the creditors.

In the *Iraqi* case, *supra* the Court held that a Mareva injunction should not preclude the defendants from using their assets to pay their debts as they fell due.

Accordingly, I varied the order made on 26 August 1983, and allowed Nupro to pay their creditors the sums stated in para. 3 of their affidavit (encl. 21), subject to verification of the creditors and the amounts by the Senior Assistant Registrar. I also allowed Nupro to pay the salaries of the artistes and other persons as listed in Exh. JAS 1 of encl. (14) up to 11 September 1983, save that no monies would be paid to the second defendant. Nupro was permitted to pay corporation tax and salaries tax in the amounts of RM95,000 and RM16,000 respectively. Nupro was also allowed to pay the costs of printing tickets: RM29,000; the costs of hire of diesel generators: RM4,000 and the costs of electrical installation: RM10,500 (encl. 21, para. 4(i),(ii) & (iv)], subject to verification by the Senior Assistant Registrar.

The Interveners also asked the Court to allow them to release RM116,000 to be used as freight charges to ship the circus animals back to the United Kingdom and another RM50,000 for costs of transportation from Subang Jaya to the docks in Singapore. I made no order with regard to this application as I was not satisfied, on the evidence available then, that the animals did not belong to the third defendant. Subsequently the Interveners filed an affidavit (encl. 33), stating that the animals, six polar bears, one black bear, four leopards, four jaguars and one black panther belonged to Chipperfield Enterprise Ltd. and not the third defendant. Attached to the affidavit is a copy of a contract concluded between the Interveners and Chipperfield Enterprise Ltd. dated 16 March 1983. In the light of this evidence, it is clear that the animals did not belong to the third defendant, but owned by Chipperfield Enterprise Ltd. I, therefore, varied my earlier order and ordered that the animals be released from jurisdiction.

The costs of the proceedings in Chambers and in Open Court shall be the costs in the cause.

Also found at [1983] 2 CLJ 255